## Fung Kong Win v Yee Moh Chai

HIGH COURT (KOTA KINABALU) — ELECTION PETITION NO K26–2 OF 2004
CLEMENT SKINNER J
9 JULY 2004

*Election — Petition — Allegation of corrupt practice — Allegation that respondent and/or his agents solicited for votes or loitered within 50 metres of polling station during election — Whether act of soliciting for votes within 50 metres of polling station constituted corrupt practice — Election Offences Act 1954 s 32(c)*

This was the petitioner's petition to avoid the election of the respondent under s 32(c) of the Election Offences Act 1954 ('the Act'), namely, that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by an agent of the candidate. The respondent was returned as the duly elected candidate with a majority of 2,933 votes in the Sabah State election for the constituency of Api-Api. The respondent defeated the petitioner, who was the only other candidate for the seat.

The sole ground upon which the petitioner sought to have the election declared void was that the respondent and/or his agents had with his knowledge or consent during the election, solicited and/or campaigned for votes or loitered within 50 metres of the polling station at SJK(C) Chung Hwa Kota Kinabalu.

The question to be determined in this application was whether the act of soliciting and/or campaigning for votes within 50 metres of the limits of a polling station constituted a corrupt practice within the meaning of s 32(c) of the Act.

**Held**, dismissing the petition:

(1) The answer to the question raised in this application must be found within the four corners of the Act. Where the election of a candidate was challenged through an election petition, his election can only be avoided on the grounds set out in s 32 of the Act (see para 15).

(2) Since the petitioner had sought to avoid the respondent's election under s 32(c) of the Act on the ground that he had committed a corrupt practice, what remained to be determined was whether the act of soliciting and/or campaigning for votes or loitering within 50 metres of the limits of a polling station was to be categorised or classified as a corrupt practice under the Act (see para 18).

(3) A reading of the Act, in particular those sections in Part III of the Act which dealt with corrupt practices, namely, ss 7, 8, 9, 10 and 11 of the Act showed that the act of soliciting and/or campaigning for votes or

loitering within 50 metres of the limits of a polling station was not classified or categorized as a corrupt practice. Hence, there was no basis for the petitioner to equate those acts prohibited by s 26(1)(e)(iii) and (iv) of the Act with a corrupt practice (see para 19).

(4) If the respondent and/or his agents had solicited for votes and campaigned within 50 metres of the limits of a polling station, such an act at most, would constitute a breach of s 26(1)(e)(iii) and (iv) of the Act. Although a contravention of s 26(1)(e)(iii) and (iv) of the Act can be a ground upon which the respondent's election may be avoided under s 32(b) of the Act, that is, for non-compliance with the provisions of any written law relating to the conduct of any election, it was not open to the petitioner to rely on this ground as he had confined himself to avoiding the respondent's election under s 32(c) of the Act only (see para 20).

[**Bahasa Malaysia summary**

Ini merupakan petisyen pempetisyen untuk menghalang pemilihan responden dibawah s 32(c) Akta Kesalahan Pilihan Raya 1954 ('Akta tersebut'), bahawa satu perbuatan rasuah atau perbuatan menyalahi undang-undang telah dilakukan berhubung dengan pemilihan calon atau dengan pengetahuan beliau atau persetujuan, atau melalui seorang ejen calon tersebut. Responden dipilih kembali sebagai calon dengan undian majoriti sebanyak 2,933 di dalam pilihan raya negeri Sabah untuk kawasan pilihan raya Api-Api. Responden telah mengalahkan pempetisyen, yang merupakan satu-satunya lawan untuk kerusi tersebut.

Satu-satunya alasan yang disandarkan oleh pempetisyen untuk mendapat pengisytiharan bahawa pilihan raya tersebut adalah terbatal ialah responden dan/atau ejennya telah dengan pengetahuannya atau persetujuannya semasa pilihan raya, memancing dan/atau berkempen untuk mendapat undi atau berlegar-legar dalam kawasan 50 meter dari stesyen mengundi di SJK(C) Chung Hwa Kota Kinabalu.

Persoalan untuk diputuskan di dalam permohonan ini adalah sama ada perbuatan memancing undi dan/atau berkempen untuk undi dalam kawasan 50 meter dari stesyen mengundi adalah satu perbuatan rasuah dalam erti kata s 32(c) Akta tersebut.

**Diputuskan**, menolak petisyen:

(1) Jawapan kepada soalan yang dibangkitkan di dalam permohonan ini ada di dalam Akta tersebut. Apabila pemilihan calon dicabar melalui petisyen pilihan raya, pemilihannya hanya boleh dielakkan atas alasan-alasan yang dinyatakan di dalam s 32 Akta tersebut (lihat perenggan 15).

(2) Oleh kerana pempetisyen memilih untuk membatalkan pemilihan responden di bawah s 32(c) Akta tersebut atas alasan bahawa beliau telah melakukan perbuatan rasuah, apa yang perlu diputuskan ialah sama ada perbuatan memancing dan/atau berkempen untuk undi atau berlegar-legar dalam kawasan 50 meter dari stesyen mengundi dikategorikan atau diklasifikasikan sebagai perbuatan rasuah di bawah Akta tersebut (lihat perenggan 18).

(3) Membaca Akta tersebut, terutamanya seksyen-seksyen di dalam Bahagian III Akta tersebut berkenaan dengan perbuatan-perbuatan rasuah, iaitu, ss 7, 8, 9, 10 dan 11 Akta tersebut menunjukkan bahawa perbuatan memancing undi dan/atau berkempen untuk undi atau berlegar-legar dalam kawasan 50 meter dari stesyen mengundi tidak diklasifikasikan atau dikategorikan sebagai perbuatan rasuah. Maka, tiada asas bagi pempetisyen untuk menyamakan perbuatan-perbuatan tersebut yang dilarang oleh s 26(1)(e)(iii) dan (iv) Akta tersebut dengan perbuatan rasuah (lihat perenggan 19).

(4) Jika responden dan/atau ejennya telah memancing undi dan berkempen di dalam kawasan 50 meter dari stesyen mengundi, perbuatan tersebut sepaling-palingnya, akan melanggar s 26(1)(e)(iii) and (iv) Akta tersebut. Walaupun perlanggaran s 26(1)(e)(iii) and (iv) Akta tersebut boleh menjadi alasan yang membatalkan pemilihan responden di bawah s 32(b) Akta tersebut, iaitu ketidakpatuhan dengan peruntukan-peruntukan undang-undang bertulis berhubung dengan perlaksanaan pilihan raya, ianya tidak terbuka kepada pempetisyen untuk bersandar kepada alasan ini kerana beliau telah membataskan dirinya untuk membatalkan pemilihan responden di bawah s 32(c) Akta tersebut sahaja (lihat perenggan 20).]

**Notes**

For cases on election petition, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1521–1559.

**Cases referred to**

*Zulkifli bin Majun v Dason Gaban* [1983] 1 MLJ 396 (refd)

**Legislation referred to**

Election Offences Act 1954 ss 7, 8, 9, 10, 11, 26(1)(e)(iii), (iv), 32(b), (c)

*Raymond Szetu (Mary Lee with him) (Lee & Kong) for the petitioner.*
*Au Bah (Ir Au & Co) for the respondent.*

**Clement Skinner J**:

**[1]** In the recently concluded Sabah state election for the constituency of Api-Api (N15), which was held on 21 March 2004, the respondent, Yee Moh

Chai was returned as the duly elected candidate with a majority of 2,933 votes. He defeated the only other candidate for the seat, Fung Kong Win who now brings this petition to avoid the election of the respondent.

**[2]** The sole ground upon which the petitioner seeks to have the election of the respondent declared void is that the respondent and/or his agents had with his knowledge or consent during the above election, solicited and/or campaigned for votes or loitered within 50 metres of the polling station at SJK(C) Chung Hwa Kota Kinabalu (see para 3A(d) 1 and 2 of the petition). Such acts are prohibited by s 26(1)(e)(iii) and (iv) of the Election Offences Act 1954 (hereafter 'the Act').

**[3]** Section 26(1) in it material parts read:

> 26(1) No person shall on polling day:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) Within a distance of fifty metres from the limits of any polling station:
>
> (i) …
>
> (ii) …
>
> (iii) solicit or persuade or attempt to persuade any person to abstain from voting for any candidate at the election;
>
> (iv) wait or loiter except for the purpose of gaining entry to the polling station to cast his vote but nothing in this paragraph shall prevent the proper officer or any person authorized by the proper officer from carrying out his duties in relation to the conduct of any election.
>
> (f) …
>
> (g) …

**[4]** The petitioner expressly pleaded in Ground 1 of the petition that the action of the respondent and/or his agents in soliciting and/or campaigning for votes within the restricted 50 metres zone 'were corrupt practices that were in contravention of s 26(1)(e)(iii) and (iv) of the Election Offences Act 1954' (see (B) Ground 1 of the petition).

**[5]** Relying on what had been pleaded in the above mentioned paragraphs of his petition, the petitioner prayed, by way of relief, that 'the election of the respondent Yee Moh Chai be declared void under s 32(c) of the Election Offences Act 1954.'

**[6]** On being served the election petition, the respondent filed this motion to have the petition struck out or dismissed on the ground that it discloses no reasonable cause of action, in that, even if proved, the allegations of the petitioner,

ie that he and/or his agents had solicited and/or campaigned for votes or loitered within 50 metres of the limits of a polling station his election, cannot avoid his election under s 32(c) of the Act because what he and/or his agents are alleged to have done are not categorized as a corrupt practice nor are they an illegal practice under the Act. It is the contention of the respondent that if his election will not be avoided, even if the allegations of the petitioner stand proved, then the petition is unsustainable and must be struck out.

**[7]** It is also of the respondent's case that even if it is proved that he and/or his agents had solicited for votes and campaigned within 50 metres of the limits of a polling station as alleged, at its highest such acts amount to a breach of s 26(1)(e)(iii) and (iv) of the Act but since a breach of s 26(1)(e)(iii) and (iv) has not been categorised as a corrupt practice under Part III of the Act which deals with corrupt practices and in particular s 11 thereof, it cannot be a ground upon which the respondent's election may be avoided under s 32(c) of the Act. Section 11 of the Act reads:

> Punishment and in capacity for corrupt practice,
>
> (1) Every person who:
>
> (a) commits the offence of personation, or aids, abets, counsels or procures the commission of the offence of personation;
>
> (b) commits the offence of treating, undue influence or bribery;
>
> (c) prints, publishes, distributes or posts up or causes to be printed, published, distributed of posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of its printer and publisher;
>
> (d) makes or publishes, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate;
>
> (e) makes or publishes, before or during any election, for the purpose of promoting or procuring the election of any candidate, any false statement of the withdrawal of any other candidate at such election; or
>
> (f) being a candidate or election agent knowingly makes the declaration as to election expenses required by s 23 falsely, shall be guilty of a corrupt practice, and shall, on conviction by sessions court, be liable, in the case referred to in paras (a) and (b), to imprisonment for 'a term not exceeding two years and to a fine of not less than one thousand ringgit and not more than five thousand ringgit, and, in any other case, to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit.' Offences under paras (a) and (b) shall be sizeable offences within the meaning of the Criminal Procedure Code.

**[8]** In this regard, counsel for the respondent is willing to concede that a contravention of s 26(1)(e)(iii) and (iv) of the Act can be a ground for avoiding the respondent's election under s 32 (b) of the Act ie for non-compliance with the provisions of any written law relating to the conduct of any election, but

it is the respondent's case that it is very clear that the petitioner does not seek to rely on s 32 (b) of the Act to avoid his election because firstly, the petitioner has restricted his allegations against the respondent to that of corrupt practice and secondly, the petitioner had in fact initially relied on s 32 (b) of the Act in his prayers but abandoned it when he amended his prayer to rely on s 32 (c) of the Act only. According to counsel for the respondent the decision of the petitioner to rely on s 32(c) of the Act only was a deliberate and conscious choice made by him because if the petitioner had sought to avoid the respondent's election under s 32(b) of the Act, he would have to prove that the respondent's breach of s 26(1)(e)(iii) and (iv) of the Act had affected the result of the election, a most onerous task given the fact that as the respondent's winning majority was so large the result was unlikely to have been affected and so the petitioner amended his petition to confine himself to avoiding the respondent's election under s 32 (c) of the Act only.

**[9]** In resisting the respondent's motion, counsel for the petitioner submitted that Part III of the Election Offences Act 1954 which is headed 'Corrupt Practices' contains four sections, namely ss 7 to 11, none of which define corrupt practice. According to 'counsel, what the Act does do is to classify certain offences and practices as corrupt practices and this classification is to be found in s 11 of the Act. Accordingly it is his submission that what is a corrupt practice is a question of law. In this regard, counsel for the petitioner drew attention to the fact that s 11(b) of the Act classifies or categorises 'undue influence', which is defined in s 9 of the act, as a corrupt practice. Counsel for the petitioner then submitted that what amounts to undue influence is a matter of fact and degree which is a matter for the court to decide. In order to show that the petitioner's petition disclosed a sustainable allegation of corrupt practice against the respondent, counsel for the petitioner drew attention to s 9(1) of the Act and to the last five lines of the section where a number of acts or practices are described, disjunctively, as undue influence. Counsel for the petitioner then submitted that when the petitioner had pleaded that the respondent and/or his agents had solicited and/or campaigned for votes within 50 metres of the limits of a polling station, the petitioner was alleging that the respondent had committed undue influence because according to counsel for the petitioner, what was pleaded by the petitioner 'contained the element of influence'. According to counsel, the ordinary meaning of the word 'solicit' is to request — it does have the effect of influence on the voters, and the meaning of campaigning is wider than soliciting and, obviously, the word 'campaign' also has the effect of influence.

**[10]** Counsel then said that since s 9(1) of the Election Offences Act defines a number of acts or practices disjunctively as undue influence, the petitioner is free to make out a case under any one of them to prove undue influence.

**[11]** It was counsel's submission that the question of whether soliciting or campaigning for votes within the prohibited 50 metres zone from a polling

station amounts to any one of the disjunctive acts of undue influence described in s 9(1) is a matter of fact and degree which is for the court to try or find.

**[12]** Counsel for the petitioner further submitted that the particulars pleaded by the petitioner amounted not only to an allegation of undue influence, but was also an allegation that the respondent had committed an illegal practice as well and that there should be a trial so that the court can determine if what the witnesses will come to say amount to undue influence and if so, whether it comes within s 26(1)(e)(iii) and (iv)of the Act.

**[13]** In deciding this motion, I should begin by stating a general proposition of procedural law. It is this: A party is bound by his pleadings. Looking at the petitioner's pleaded case, it is clear to me that the petitioner seeks to have the election of the respondent declared void on one ground only, namely, that the respondent has breached or contravened s 26(1)(e)(iii) and (iv) of the Act in that the respondent and/or his agent solicited and/or campaigned for votes or loitered within 50 metres of the limits of a polling station. It is also clear to me that the petitioner, by expressly pleading that what the respondent and/or his agents had done 'were corrupt practices', has equated the act of soliciting or campaigning for votes or loitering within 50 metres of the limits of a polling station, with a corrupt practice. Having done so, the petitioner seeks to avoid the respondent's election under s 32(c) of the Act ie for having committed a corrupt practice in the manner particularized in the petition.

**[14]** The critical question that has arisen for decision in this application may be stated thus: does the act of soliciting and/or campaigning for votes within 50 metres of the limits of a polling station constitute a corrupt practice within the meaning of s 32(c) of the Act? If it is, then I would say that the petitioner has by his pleadings succeeded in raising a sustainable allegation of corrupt practice against the respondent which in turn discloses a reasonable cause of action against the respondent which, for the reasons explained by counsel for the petitioner in his submissions, it is unsuitable for summary disposal and must go for trial. However, if it is not a corrupt practice within the meaning of s 32(c) of the Act, then it must follow that for the reasons given by the respondent in making this application, the petition is clearly unsustainable and must be struck out. I should also say that in my judgment the question whether what the respondent is alleged to have done is or is not a corrupt practice within the meaning of s 32(c) of the Act is a matter of pure interpretation of the relevant provisions of the Act which does not involve the consideration of any disputed facts.

**[15]** In my judgment the answer to the critical question raised in this application must be found within the four corners of the Election Petition Act 1954 because as will be seen shortly, where it is sought to challenge the election of a candidate through an election petition, his election can only be avoided on the grounds set out in s 32 of the Act.

**[16]** In view of its importance to this hearing, I will now set out s 32. It reads:

> Avoidance of election on election petition
>
> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
>
> (d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or
>
> (e) that the candidate was at the time of his election a person disqualified for election.

**[17]** I have set out the provisions of s 32 in full to show that when a petitioner seeks to avoid an election through an election petition, there are only five grounds upon which the election judge may declare a candidate's election to be void and those five grounds are stated in sub-paragraphs (a)(b)(c)(d) and (e) of s 32. Of the five grounds set out in s 32 of the Act, we are here concerned only with sub-para (c) because it is clear from prayer (a) of his petition and the facts pleaded therein that the petitioner seeks to avoid the respondent's election only under s 32 (c) of the Election Offences Act 1954 on the ground that a corrupt practice was committed by the respondent.

**[18]** Returning to the question at hand, while I agree with counsel for the petitioner that the Election Offences Act does not contain a definition of a corrupt practice, I think it is important, when answering the question, to recognize that in the context of election law and even more so where it is sought to avoid the election of a returned candidate under s 32(c) of the Act, as is the case here, it is the classification or categorisation of a particular practice or act as a corrupt practice and not the definition of that term that is all important. I say this because it will be seen from a reading of s 11 of the Act that certain practices at election time are classified as a corrupt practice even though ordinarily such practice would not be regarded as being of a 'corrupt' nature as that term is generally understood, and for which a candidate's election may be declared void

even though what he has done is not 'corrupt'. Thus, to put up a poster which refers to an election and which does not bear on its face the names and addresses of its printer and publisher is categorised as a corrupt practice.

**[19]** Since the petitioner seeks to avoid the respondent's election under s 32(c) of the Act on the ground that he has committed a corrupt practice, what remains to be determined is whether the act of soliciting and/or campaigning for votes or loitering within 50 metres of the limits of a polling station are categorised or classified as a corrupt practice under the Act. A reading of the Act and particularly those sections in Part III of the Act which deal with corrupt practices, namely, ss 7, 8, 9, 10 and 11, show that such acts, while they may expose a candidate to prosecution for an offence under s 26(2) of the Act and even to an election petition presented under s 32 (b) of the Act, are not classified or categorised as a corrupt practice. In my judgment there was no basis for the petitioner to equate those acts prohibited by s 26(1)(e)(iii) and (iv) with a corrupt practice. It must follow from what I have said that the answer to the question posed must be answered in the negative.

**[20]** Since the act of soliciting and/or campaigning for votes within 50 metres of a polling station is not a corrupt practice within the meaning of s 32(c) of the Act, I agree with counsel for the respondent that even if proved, the allegations of the petitioner that the respondent and/or his agents had solicited for votes and campaigned within 50 metres of the limits of a polling station, at its highest constitute a breach of s 26(1)(e)(iii) and (iv), but the election of the respondent cannot be avoided on this ground under s 32(c). I also agree with counsel for the petitioner that while a contravention of s 26(1)(e)(iii) and (iv) can be a ground upon which the respondent's election may be avoided under s 32(b) of the Act ie for non-compliance with the provisions if any written law relating to the conduct of any election, it is not open to the petitioner to rely on this ground as he has confined himself to avoiding the respondent's election under s 32(c) only.

**[21]** Counsel for the petitioner submitted that the petitioner also seeks to avoid the respondent's election on the ground that the respondent had committed an illegal practice when he and/or his agents solicited and/or campaigned for votes or loitered within 50 metres of the limits of a polling station and that under s 32(c) of the Act, the election of a candidate may be avoided for his having committed an illegal practice. I regret I cannot agree with this submission. In the first place, the petitioner has not alleged anywhere in his petition that what the respondent and/or his agents had done were illegal practices and secondly, even if the petitioner had pleaded illegal practice, in my judgment the acts prohibited by s 26(1)(e)(iii) and (iv) do not constitute illegal practice because those acts which are regarded as illegal practices are fully set out in ss 15 to 23 of the Act and relate principally to matters concerning election expenses, which is completely different in nature from what the respondent and/or his agents are alleged to have done here. Having said that. I should point out that

I do accept that the election of a candidate who commits an illegal practice contrary to the provisions of ss 15 to 23, can be declared void under s 32(b) of the Act, in that, he has not complied with the provision of any written law relating to the conduct of any election, but the petitioner does not seek to avoid the respondent's election here under s 32(b).

**[22]** I will now deal with to the petitioner's submission that by his pleadings he has raised an allegation of undue influence against the respondent and that undue influence is categorised in s 11 of the Act as a corrupt practice, and so for all the reasons given in his counsel's submissions there should be a trial to determine the question of law whether soliciting and/or campaigning for votes within 50 metres of the limits of a polling station constitutes undue influence.

**[23]** Now, s 9 of the Act fully describes or defines what undue influence means in the context of election law. I agree with counsel for the respondent that a reading of the section shows that the essence of the offence of undue influence is the infliction of fear and injury, whether of a temporal or spiritual nature. However, the facts pleaded in the petition and the particulars stated therein contain absolutely no allegation of this nature at all and it would be wrong to entertain the submissions of counsel for the petitioner on the point for two reasons: first, it is very obvious that the petitioner is seeking to introduce though the submission of counsel a fresh issue or charge into the petition which he cannot do since it would be tantamount to allowing the petitioner to present a new petition, which he is now time barred from doing (see *Zulkifli bin Majun v Dason Gaban* [1983] 1 MLJ 396 at p 396 para I); second, the petitioner is trying to 'stretch' what is stated by way of particulars in the petition to cover or raise undue influence, but I agree with counsel for the respondent that a honest and plain reading of the pleadings and the particulars in the petition show that they do not allege that by soliciting an/or campaigning for votes within 50 metres of the limits of a polling station, the respondent and/or his agents had engaged in any form of undue influence.

**[24]** With reference to the submission of counsel for the petitioner that on the present state of the pleadings, the court should wait to hear whether what the witnesses have to say amount to undue influence or not, and, if so, whether what they say comes within s 26(1)(e)(iii) and (iv) of the Act, the short answer to this submission is that since the issue of undue influence-was never pleaded, it is not even before the court. So there is no question of the court having to wait to hear what the witnesses have to say about undue influence so as to enable it to decide whether as a matter of law the allegation of undue influence is made out as alleged by counsel for the petitioner.

**[25]** In the result, for all the reasons set out above, it must follow that the petition as it stands does not disclose a reasonable cause of action as the allegations of the petitioner, even if proved, would not be a ground for avoiding the respondent's election under s 32(c) of the Act. The petition as it stands is

insufficient, even if proved, to entitle the petitioner to the relief he seeks. The petition is on the face of it obviously unsustainable and must be struck out, which I now do with costs to the respondent.

*Petition dismissed.*

Reported by Lim Lee Na